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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1189

AMERICAN STANDARD INC.,
Petitioner,

v.

CRANE CO., *et. al.*,
Respondents.

BRIEF FOR RESPONDENT CRANE CO. IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM E. HAUDEK
295 Madison Avenue
New York, N. Y. 10017
(Tel. (212) 532-4800)

JOHN W. CASTLES III
25 Broadway
New York, N. Y. 10004
(Tel. (212) 344-8480)
Attorneys for Respondent.

POMERANTZ LEVY HAUDEK & BLOCK,
LORD DAY & LORD,
of Counsel.

May 12, 1975.

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BRIEF FOR RESPONDENT CRANE CO. IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner American Standard, Inc. ("Standard") sued respondent Crane Co. ("Crane") to recover alleged short-swing profits under § 16(b) of the Securities Exchange Act. The District Court for Southern New York denied Crane's motion for summary judgment and granted Standard's motion on the issue of liability (41a; 346 F. Supp. 1153)[1]. The Second Circuit reversed and summarily dismissed the action (1a; 510 F. 2d 1043). Standard seeks certiorari; Crane submits this brief in opposition.

1. As used herein, numerals followed by "a" (e.g., "41a") refer to the Appendices of the petition. "A" followed by a numeral (e.g., "A50") refers to the Appendix in the Court of Appeals. "R" refers to the record of this action (S.D.N.Y., 68 Civ. 2461); thus "R87(10) Ex. 20" means Exhibit 20 forming part of document No. 87(10) in the record.

The text of § 16(a) and (b) appears in the opinion below (4a).

Counter-Statement of the Issues and Questions Presented

The case arises from Crane's unsuccessful struggle for control of Westinghouse Air Brake Co. ("Air Brake"). Crane bought more than 10% of Air Brake's common stock in the market and by tender offer. Air Brake, with the help of Standard, resisted Crane's advances. Crane's tender offer failed when Standard, in concert with Air Brake, fraudulently manipulated the market in Air Brake stock in violation of the Exchange Act[2]. The control fight came to an end when Air Brake, over Crane's vigorous opposition, merged into Standard. The merger automatically converted Crane's Air Brake stock into Standard preference stock. Standard being Crane's largest competitor, Crane had to sell substantially all of the Standard preference stock thrust on it by the merger.

Standard contends primarily that Crane's purchases of Air Brake stock and its "sale" of that stock, within six months, in the Air Brake-Standard merger are actionable under § 16(b). On closely analogous facts, however, this Court recently rejected 16(b) liability; *Kern County Land Co.* v. *Occidental Pet. Corp.*, 411 U.S. 582 (1973). Standard would distinguish *Occidental* because, so it says, Crane had access to, and received, inside information from Air Brake. The Court of Appeals seriously doubted the admissibility of this contention, which had not been advanced in the District Court; but it found no need to resolve the doubt since it held that Standard's evidence, if admissible, did not tend to show that Crane received or had access to inside information (8a-11a, 14a-15a, 22a-24a). Standard now seeks certiorari in order to have this Court review the evidentiary conclusions of the Court of Appeals.

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2. The fraud was adjudicated in *"Crane I"*, i.e., *Crane Co.* v. *Westinghouse Air Brake Co. et al.*, 419 F. 2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

Alternatively, Standard contends that, for 16(b) purposes, Crane's pre-merger purchases of Air Brake common stock should be matched against its post-merger sale of Standard preference stock. Such matching of purchases and sales of different securities of different issuers would be contrary to the clear language and purpose of § 16(b); not a single precedent supports it; and the Court of Appeals properly rejected it.

The following questions are thus presented:

1. Does Standard's evidence, assuming its admissibility, tend to show the availability of inside information to Crane?

2. In light of General Rule 9(g) of the Southern District of New York (23a, n. 18), may Standard now claim that inside information was available to Crane even though Standard advanced no such contention in the District Court and did not call that Court's attention to any such evidence?

3. Can Crane's purchases of Air Brake common stock be matched, for 16(b) purposes, against Crane's sale of Standard preference stock, even though the transactions involved different securities of different issuers?

Statement of the Case

Crane's purchases of Air Brake stock.

From June 1967 to May 1968, Crane purchased substantial amounts of Air Brake common shares with a view to acquiring control (A127-138; 8a). On January 26, 1968, its holdings passed the 10% mark (A66). By June 7, 1968, the date of the Air Brake-Standard merger, Crane's holdings were 32% (1,480,623 Air Brake shares out of 4,603,756 then outstanding) (A64, 138; 8a).

The contest for control of Air Brake.

Following an informal merger suggestion in May 1967 (5a; R87(10) Ex. 20), Crane submitted a detailed merger proposal to Air Brake's management on August 29 (R87(1), pp. 42-45). Air Brake's board rejected it on November 3, 1967 (R87(2), p. 26; *Crane I*, 419 F. 2d at 790).

From that time, the relationship of the two companies radically deteriorated. Crane accelerated its purchases of Air Brake stock; by early December it owned 421,000 shares, close to 10% (A127-134). Air Brake reacted sharply. It amended its by-laws so as to prevent Crane from securing board representation (5a; R87(1), pp. 111-13); and it advised Crane that it was "not interested in any kind of merger" (A66). Air Brake's chairman, A. King McCord, refused any discussion of Crane's request for three positions on the Air Brake board (R87(2), p. 54).

Crane countered by demanding Air Brake's list of stockholders; Air Brake refused (R87(1), pp. 117-118). On January 8, 1968 Crane brought suit for the stock list (*id.*); but it took three successive actions—one in Pittsburgh, two in New York—and a contempt proceeding until the list was finally produced, *Crane Co.* v. *Westinghouse Air Brake Co.*, 56 Misc. 2d 538, 288 N.Y.S. 2d 984 (S. Ct. 1968). Ever since January 8, 1968 Crane and Air Brake have been in open warfare in and out of court, including nine separate actions and two contempt proceedings brought within less than six months. A list of these litigations is appended hereto (Addendum, pp. 22-24, below).

On February 29, 1968, Crane, now a 10% stockholder, filed a 14B statement with the SEC declaring its intention to solicit proxies for the Air Brake board election (6a, 43a). This step sparked counter-action by Air Brake in

the form of merger discussions with Standard (43a; R87 (2), pp. 73, 81-82). On March 4, 1968, Air Brake and Standard publicly announced a merger agreement, subject to stockholder approval (A108; Pet. 7). Under the merger terms, Air Brake's existence was to end and its common stock to be converted into a new class of Standard convertible preference stock (6a).

Standard is the country's largest plumbing manufacturer (R87(1), p. 257), Crane one of the largest (A273-275); Standard is thus Crane's principal competitor (*ibid.*; 8a). Standard and Air Brake knew and intended that the merger would have a threefold impact on Crane: (a) It would block Crane from acquiring control of Air Brake; (b) it would make Crane the largest stockholder in its principal competitor, contrary to the antitrust laws; (c) Crane would thus be forced promptly to sell the Standard shares it would receive in the merger. Thereupon Standard would sue Crane for its alleged short-swing profits (A200-203).

Crane vigorously resisted the merger plan, not only by soliciting proxies in opposition, but by continuing its purchases of Air Brake stock (A67). On April 6, 1968 Crane announced a registered tender offer to exchange $50 face value of its debentures for each Air Brake share (A67; 6a); but on April 19, the scheduled expiration date of the tender offer, Standard, in concert with Air Brake, fraudulently manipulated the market in Air Brake stock through a series of cleverly concealed wash transactions, with the intended result that the market price rose from 45¼ to 50 and Crane's tender offer failed, despite three successive extensions to April 29, May 14 and May 24, 1968 (7a; *Crane I*, 419 F. 2d 787).

On May 6, Crane sued under the fraud provisions of the Exchange Act to enjoin the Air Brake-Standard merger. The District Court, after trial, dismissed the suit (7a). The

reversal of that decision by the Court of Appeals (*Crane I*) came too late to prevent the consummation of the merger.[3]

On May 16, the Air Brake stockholders voted to approve the merger (A109). They also elected three of Crane's designees to the Air Brake board, but Air Brake refused to seat them and promptly brought suit to enjoin them from taking office (R112).

The Air Brake-Standard merger was consummated at the close of business on June 7, 1968, making Crane automatically the owner of 36% (740,311 shares) of Standard's preference stock, convertible into 15% of Standard's common stock (A116-118). Crane had thus become the largest stockholder of its principal competitor. Crane promptly sold all but 10,000 of its Standard preference shares on June 13, 1968 at a net price of $75,735,891 (A125). As the Court of Appeals held in *Crane I*, the sale was required by antitrust considerations and forced by Standard's threat of an antitrust divestiture suit (419 F. 2d at 791, 794, 798). Four days after this sale, Standard commenced its present 16(b) action.

Crane's alleged inside information.

Standard asserts repeatedly that Crane received inside information of the impending Air Brake-Standard merger long before its public announcement on March 4, 1968, and that Crane, armed with this information, bought substantial amounts of Air Brake stock. The contention is demonstrably false. It was rejected by the Court of Appeals[4]; it is contrary to Standard's own moving affidavit (A67);

3. *Crane I* held that "Standard's deception caused injury to Crane" (419 F. 2d at 797), and remanded the fraud action to the District Court for determination of the appropriate remedies, including damages (pp. 803-04). These issues are expected to be tried this year.

4. The District Court likewise held that Crane did not have advance knowledge of the merger (22a, 54a).

and, as we shall presently show, the record plainly refutes it.

Preliminarily we note that, under the rule of *Occidental*, inside information would be relevant only if Crane received it "by reason of its ownership of more than 10% of the outstanding shares of" Air Brake (411 U.S. at 596). As noted, Crane became a 10% stockholder on January 26, 1968 (A66). Information received prior to that date does not fall under § 16(b), for it could not have been obtained "from substantial stockholdings that did not yet exist" (411 U.S. at 597). The great bulk of Crane's alleged inside information predates January 26, 1968 and is, therefore, irrelevant.

1. According to Standard (Pet. 5, 18), Crane learned from inside sources of the impending Air Brake-Standard merger six weeks before the public announcement of March 4, 1968 (i.e., in late January); Crane, it is said, thereupon resumed its temporarily suspended purchases of Air Brake stock and became a 10% stockholder on January 26, 1968. Actually, no Air Brake merger—with Standard or anyone else—was in contemplation in January.[5] The merger rumors that Crane heard were false and did *not* come from inside sources (A215-216). In any event, they came to Crane before January 26, for they were the motive for Crane's acquiring the 10%.[6] They were, therefore, not "inside information" within the *Occidental* rule.

5. Standard falsely asserts (Pet. 6) that its merger discussions with Air Brake began "[a]pproximately a month before Crane became a 10% stockholder", i.e., about the end of December 1967. Actually, Air Brake's chairman McCord testified as late as February 1, 1968 that he had no plan to sell Air Brake, had conducted no negotiations whatever and had rejected many inquiries from others because Air Brake wanted to remain independent (R100, pp. 145, 187-188). Standard's president Eberle received the same advice when he met McCord in January (R91, pp. 48-49). The Air Brake-Standard negotiations did not begin until the week of February 26 (see p. 9 n. 10, below).

6. Crane learned of the rumors on January 23 and 24 (A217) and resumed its Air Brake purchases on January 24 (A66, 135), all before the critical date of January 26.

2. Standard asserts (Pet. 7) that Crane, through discussions with Air Brake, obtained "confidential information" of miscellaneous other Air Brake data. Standard's own record references (Pet. 7 n. 11) demonstrate that each of these discussions occurred, if at all, prior to January 26, 1968.[7]

3. Only one incident cited by Standard occurred after January 26, 1968: Crane's chairman, Thomas M. Evans, called Air Brake director John A. Mayer on February 16[8] to request a meeting with the Air Brake board. Mayer volunteered that he thought Air Brake would get "an offer" (unspecified of what sort or from whom), and that Crane would be "bought out" at $50 in cash. Evans replied that

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7. Crane, it is said, learned of the following subjects:

"Air Brake's consideration of alternative merger possibilities" (Pet. 7): Crane's chairman, Thomas M. Evans, testified on January 30, 1968 (A213) that Air Brake director John A. Mayer had told him of merger overtures by the Rockwell Company, which Air Brake turned down (A219-220). The latest conversation between Evans and Mayer prior to this testimony was on January 15, 1968 (Pet. 28), i.e., before Crane became a 10% stockholder.

"[I]mpending changes in Air Brake's top management" (Pet. 7): None of Standard's record references (Pet. n. 11) deals with a discussion of this subject, and we know of none after January 26, 1968.

"[T]he obsolescence of Air Brake's inventories" (Pet. 7): Evans testified on January 22, 1968 (A141)—*before* Crane acquired 10% —what a former Air Brake employee had told him a few weeks earlier (A144-145).

"[T]he extent to which Air Brake's stock was disbursed (sic) among many small stockholders" (Pet. 7): That subject, obviously not secret, was discussed on May 25, *1967* (R87 (10), Ex. 20), before Crane purchased any Air Brake stock.

8. The date, it is important to note, was not February 23, as Standard asserts (Pet. 6). Evans, on deposition, was indeed asked about a conversation of February 23; but his answer immediately shifted to a telephone call "about the middle of February" (A248). Mayer, who had kept a record of telephone calls, testified that in February 1968 he received only one call from Evans, namely, on the 16th (A196).

this was not what he wanted and that Crane had not bought for speculation (A248-249).[9]

The so-called information supplied by Mayer was false. No offer to Air Brake was, at the time, in the making; and no one ever offered to "buy out" Crane, let alone to buy it out for cash.[10] False information is worse than none; it certainly does not qualify as "inside information".

Crane treated it for what it was worth. In the two weeks after February 16 Crane purchased no Air Brake stock at all (A136; 11a). On March 1 and 4 it purchased 2800 shares (*ibid.*)—less than two-tenths of one percent of all the Air Brake shares it bought. On March 4 the merger was publicly announced (Pet. 7); even Standard does not contend that the merger was thereafter inside information. Crane did not learn of the proposed merger until March 4, when Standard's president Eberle, on his own initiative, met Evans and handed him a copy of the press release (A67; R91, pp. 96-97).

4. According to Standard, Crane had at least an *opportunity* to receive inside information from Air Brake; but the active and intense hostility between the companies rendered the possibility of Crane's access to inside information "extremely remote"—too remote to be significant (*Occidental*, 411 U.S. at 598). Standard's suggestion that Air

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9. Standard's statement that "Mayer divulged the proposed merger terms to Evans" (Pet. 6) is thus contrary to fact.

10. Prior to February 16, 1968, Air Brake discouraged any merger overtures because it wanted to remain independent (R102, p. 1; R91, pp. 48-49; R100, pp. 45, 187-188). On February 19—*after* the February 16 Evans-Mayer telephone conversation—Blyth & Co., an investment banker, suggested to Air Brake a merger with Standard on the basis of exchanging Air Brake stock for Standard convertible preference stock (R87(1), pp. 247-250). On February 20, Air Brake decided to follow up on Blyth's suggestion (R87(1), p. 260). Standard first learned of Blyth's suggestion on February 24 (R101, p. 3). Negotiations on the basis suggested by Blyth began during the week of February 26 (*ibid.*). A cash payment for the Air Brake stock was never contemplated.

Brake director Mayer was a potential informer because he was "sympathetic" or "friendly" to Crane (Pet. 6, 15) is sheer fantasy.[11]

This is the sum total of Crane's so-called inside information.

Proceedings below.

Standard's contention that Crane received or had access to special inside information was not advanced in the District Court but made its first appearance in Standard's answering brief on appeal. In short, Crane and Standard cross-moved for summary judgment (A50, 61). Standard's moving papers incorporated by reference the records of three other actions (A61, 64-65), comprising tens of thousands of pages. Standard's affidavit specified the data and evidence in these records on which it relied (A65-68). The lengthy recital, far from suggesting inside information, negated it. In fact, only two statements in Standard's moving affidavit dealt with information received by Crane. One said that Crane had heard "from various sources" (not claimed to be inside sources) of Air Brake merger talks with companies other than Standard (A66). The other statement admitted that Crane did not learn of the Air Brake-Standard merger agreement until March 4, 1968, the day of the public announcement (A67).

Under General Rule 9(g) of the District Court (quoted at 23a, n. 18), Standard was required to file a separate statement of the undisputed and disputed facts it deemed relevant to support its own motion and to oppose Crane's.

11. Mayer opposed Crane's merger proposal (R87(2), pp. 10-12, 16-17). He voted against giving Crane representation on the Air Brake board (R87(2), p. 45). In January and, again, in February 1968, Mayer told Evans to stop using him as a means for communicating with Air Brake (R87(2), pp. 43, 53). After initial hesitation, Mayer supported the Air Brake-Standard merger (R87(2), pp. 81, 85; R87(1), p. 260).

Standard's 9(g) statement (A78-80) did not so much as mention inside information, either as disputed or undisputed (23a).

The District Court decided for Standard, but without referring to any of the evidence now invoked by Standard (41a). The next day, the Second Circuit announced its decision in *Occidental*[12]; like this Court's later decision in the same case, it rejected 16(b) liability upon facts analogous to those at bar. The District Court thereupon withdrew its decision and invited discussion of the effect of *Occidental* (64a). Both sides submitted new affidavits (107, 115) and briefs (22a), but Standard, presumably loath to create a possible issue of fact (22a, n. 17), still refrained from claiming inside information or from amending its Rule 9(g) statement (22a-23a).

The District Court ultimately reinstated its decision in favor of Standard, but on grounds unrelated to inside information (64a). Standard's answering brief on appeal asserted for the first time that evidence buried in the three records, not previously called to anyone's attention, allegedly showed Crane's inside information. The Court of Appeals doubted the admissibility of Standard's new contention but, finding the supposed evidence not probative, saw no need to resolve the doubt (8a-11a, 14a-15a, 22a-24a).

Defenses of Crane left open by the Court of Appeals.

Crane's answer (A22) alleged various defenses on which the Court of Appeals did not pass (26a-27a): The merger was the result of Standard's fraudulent market manipulation; Crane sold its Standard preference shares under antitrust compulsion; the shares were unregistered and exempted from § 16(b).

12. *Abrams* v. *Occidental Pet. Corp.*, 450 F. 2d 157 (2d Cir. 1971), *aff'd* sub nom. *Kern County Land Co.* v. *Occidental Pet. Corp.*, 411 U.S. 582 (1973).

Reasons for Denying the Writ

POINT I

Standard's claim of inside information, properly rejected by the Court of Appeals, presents only a factual dispute that does not warrant review by this Court.

1. Just two years ago, this Court's decision in *Occidental* (411 U.S. 582) thoroughly canvassed the effect of a defensive merger on the 16(b) liability of an unsuccessful contender for control. Standard would have the Court traverse this well-plowed ground once more. This Court, however, has heretofore refused similar requests, even in the face of a rather broad application of *Occidental*.[13] The law on the subject having been settled, it would seem that its application to the infinite variety of individual cases should be left to the Courts of Appeals.

In the present case, the Court below meticulously adhered to *Occidental*. Under the rule of that case, the 16(b) liability of a contender for control defeated by a defensive merger depends on two critical factors: (1) likelihood of access to inside information, and (2) ability to control the merger (411 U.S. at 598, 600). The Court below recited the two critical factors (20a). It found them absent here. The dismissal of the action necessarily followed.

Standard would read the decision below as granting a defeated tender offeror absolute immunity, regardless of proven abuse of inside information (Pet. 11, 13-14); but the Court of Appeals held the very opposite. It recited Standard's alleged evidence of inside information (10a-12a); it inquired "whether facts were presented below that overcame the controlling effect" of *Occidental* (22a); and it "found upon the record as presented by Standard" that

13. *Gold* v. *Sloan*, 486 F.2d 340 (4th Cir. 1973), *cert. denied* sub nom. *Gold* v. *Scurlock*, 42 L. Ed 2d 112 (1974).

Crane had no access to inside information (23a). The Court below thus undertook precisely the factual determination that *Occidental* prescribes.

Standard's actual grievance is its disagreement with the factual holdings of the Court of Appeals. That is hardly a ground for the grant of certiorari. Factual questions, such as the date at which Crane received this or that piece of information, or the truth of what Mr. Mayer said to Mr. Evans, are not of such broad and general concern as to invite review by this Court.

The proposed factual review is particularly unappealing since the procedural basis of Standard's evidence is highly questionable. As the Court below found (8a-11a, 14a-15a, 22a-24a), Standard never raised the issue of inside information in the District Court, nor did it call that Court's attention to the purported evidence it now invokes. Its tactic of withholding the charge of inside information prevented Crane from adducing contrary evidence and helped Standard to avoid the risk of creating an issue of fact (22a, n. 17). Standard's stratagem, we submit, precluded it from introducing the issue of inside information at the appeal stage.[14] Before this Court could consider Standard's evidence, it would thus have to determine its admissibility; that would involve the Court in examining, inter alia, Standard's briefs in the District Court (22a) and the effect of a local District Court rule (23a). We doubt that procedural details of such limited interest should detain this Court.

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14. The rule, invoked by Standard (Pet. 13, n. 20), that a District Court judgment may be sustained on any ground finding support in the record, *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957), cannot apply where, as here, a District Court rule requires the parties seeking and opposing summary judgment to define the issues (23a, n. 18) and one party deliberately withholds an alleged ground of liability from the District Court. That ground will be barred on appeal because of waiver, estoppel or under some similar rubric. See *Helvering* v. *Salvage*, 297 U.S. 106, 109 (1936); *In re Steen*, 509 F.2d 1398, 1402-03, n. 4 (9th Cir. 1975).

2. In any event, the evidence does not show the availability of inside information.[15] As noted (p. 7, above), only the period after January 26, 1968 is relevant. For this period, Standard cites only one incident of information allegedly received by Crane: the Evans-Mayer telephone conversation of February 16 (A248-249). The "information" given by Mayer on that occasion was not inside information since it was false (pp. 8-9, above); moreover, Crane did not "abuse" it since it had no effect whatever on Crane's purchases of Air Brake stock (p. 9, above).

Standard refers to other post-January conversations between Crane and Air Brake or Standard (Pet. 28-30), but there is not an iota of evidence that any information passed. Standard argues that information *might* have passed; but if 16(b) liability were to arise from every contact between the contender and the target company or its successor (without proof of the actual receipt of inside information), the law would penalize and, hence, effectively prevent not only casual social contacts, but all efforts to negotiate an amicable adjustment of the contest for control. *Occidental* involved precisely such negotiations (411 U.S. at 587); they did not prevent this Court from finding that Occidental had no access to inside information. By the same token, the theoretical possibility that some dissident director or employee of the target company might slip confidential information to the contender (Pet. 14) existed in *Occidental* no less than it might have existed here.

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15. There is no dispute that the other *Occidental* requirement, power to control the merger (411 U.S. at 599, 600), is likewise absent (21a). Indeed, the legislative materials quoted in *Occidental* (411 U.S. at 592-93) demonstrate that 10% stockholders are deemed insiders only because of their presumed control of the corporate affairs. In an unorthodox situation, however, such as that at bar, the Court will "apply the statute only when its application would serve its goals" (411 U.S. at 595). An embattled tender offeror such as Crane, even though owning more than 10%, does not enjoy a vestige of control. In the absence of control, any possibility of its abuse disappears, and with it any reason for applying § 16(b).

The crucial fact is that the profound antagonism between Crane and Air Brake rendered the possibility of inside information utterly remote. Crane and Air Brake were engaged in a bitter proxy battle. They were locked in multiple litigations. The one piece of information sought by Crane was the Air Brake stock list; Crane had to pry it loose by three successive actions and a contempt proceeding. Air Brake not only refused Crane's request for board representation, but amended its by-laws to forestall such representation; when three Crane designees were finally elected to the board, Air Brake prevented them from taking office. Standard and Air Brake even stooped to a fraudulent market manipulation in order to frustrate Crane's tender offer. The suggestion that Air Brake might voluntarily have given inside information to Crane thus borders on the absurd.

In *Occidental*, the hostility between the contender (Occidental) and its opponents (Old Kern and Tenneco) was far less aggravated. In fact, two weeks after the announcement of the proposed Old Kern-Tenneco merger, Occidental made its peace with Tenneco; it accepted from Tenneco some $8,800,000 in return for the grant of a stock option to Tenneco; soon thereafter, it withdrew its opposition to the merger (411 U.S. at 587-88). Having thus abandoned its attitude of hostility to Old Kern's management, Occidental as a 20% stockholder might, indeed, have received inside information from Old Kern.[16] Nevertheless, this Court held that Occidental's involvement in the merger was "involuntary" and that Occidental lacked the "possibility of speculative abuse of inside information" (411 U.S. at 600). The same conclusion must apply *a fortiori* to Crane.

16. Standard erroneously asserts (Pet. 11-12) that Occidental's opportunity for inside information was limited to the one day (May 11, 1967) from its becoming a 10% stockholder to the issuance of its increased tender offer. This Court, however, far from focusing just on May 11, held it extremely unlikely that Occidental received inside information "before or after May 11, 1967" (411 U.S. at 598).

POINT II

For 16(b) purposes, Crane's pre-merger purchases of Air Brake common cannot be matched against its post-merger sale of Standard preferred because the transactions involved different securities of different issuers.

1. By its clear terms, § 16(b) applies only to purchases and sales of securities of the same issuer.[17] The Court of Appeals so held (27a-29a), and Standard does not contend that the statutory language can be read otherwise. In the absence of ambiguity, "we are not free to adopt a construction [of § 16(b)] that not only strains, but flatly contradicts, the words of the statute"; *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 427 (1972).

In the present case, Standard was not the "issuer" of the Air Brake common shares (which Crane had bought). Air Brake was not the "issuer" of the Standard preference shares (which Crane sold). Neither Standard nor Air Brake acquired, therefore, a 16(b) claim against Crane. Standard, to be sure, was the successor by merger of Air Brake; but that meant only that Standard acquired Air Brake's assets and liabilities. Standard could not acquire a 16(b) claim owned by Air Brake, for Air Brake did not own any such claim.

Nor did the merger turn Standard into the "issuer" of the Air Brake common. Section 3(a)(8) of the Act defines "issuer" as "any person who issues or proposes to issue any security". The Air Brake stock was issued by Air Brake, not by Standard; it represented an interest in Air Brake,

17. The statute refers to the insider's relationship to "the issuer"; deals with the short-swing purchase and sale of any equity security of "such issuer"; declares the resulting profits to be recoverable by "the issuer"; and authorizes suit by "the issuer" or any security holder of "the issuer".

not in Standard. The merger terminated the existence of the Air Brake stock, along with that of Air Brake itself. Standard could hardly become the "issuer" of non-existent stock in a non-existent corporation.

2. Not only the language but the policy of the statute forbids its application. The declared purpose of § 16(b) is to prevent the abuse of information an insider obtains "by reason of his relationship to the issuer." In the case of a 10% owner such as Crane, the "relationship to the issuer" must exist both at the time of purchase and of sale.[18] When Crane purchased its Air Brake stock, it certainly had no actual or presumptive "relationship" to Standard. Accordingly, it could not obtain inside information about Standard. The statute affords, therefore, no reason to restrict Crane's right to sell its Standard stock.

Moreover, *Occidental* holds that § 16(b) reaches "unorthodox" or "borderline" transactions only if they lend themselves to speculative abuse through access to inside information (411 U.S. at 593-95). The chain of purchase of Air Brake stock, merger, and sale of Standard stock is certainly not the "traditional" type of transaction envisaged by Congress in enacting § 16(b). Since Crane had no access to inside information from either Air Brake or Standard, and no ability to control the merger, it would be contrary to the statutory purpose and policy to apply § 16(b) to this unorthodox series of transactions.

3. Standard argues that the pre-merger Air Brake and the post-merger Standard were not "different" issuers because they were successive owners of "a single continuing enterprise" (Pet. 19, 21). They were nothing of the sort. The merger combined two previously separate enterprises

18. By its terms, § 16(b) does not "cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved * * *."

into a new one, bigger than either of its predecessors and different from both. The old Air Brake stock represented an interest only in Air Brake's assets and business. The post-merger Standard shares represented an interest in a vastly larger complex, of which the former Air Brake assets were just a minor part. Neither legally nor economically does it make sense to speak of "a single continuing enterprise".[19]

But even on the impossible assumption that Standard was the "issuer" of the Air Brake shares, there could be no matching of Crane's transactions; for Crane purchased common and sold preferred stock. It is elementary that purchases and sales of different classes of securities of the same issuer cannot be matched: *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 237 n. 13 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943):

> "The statute might be read literally to permit a recovery where stock of one class is purchased and stock of another class sold. But the possibility that Congress intended such a result is beyond the realm of judicial fantasy."

4. The petition (19-20) argues that if Standard had been merged into Air Brake (instead of Air Brake into Standard), the surviving corporation would be identical with the pre-merger Air Brake, so that Crane would have bought and sold securities of the same issuer. According to Standard, the "happenstance" that the merger took one form rather than the other should not control the application of § 16(b). The argument is replete with fallacies.

(a) Had Standard been merged into Air Brake (upon the same terms as the actual merger), Crane would have

19. The convenient label "successor security" used in some SEC regulations (Pet. 20) certainly does not mean that the Commission considers the securities issued in a merger as identical with the pre-merger securities for which they are exchanged.

received preference stock of the surviving Air Brake. A sale by Crane of that preference stock could not be matched against Crane's pre-merger purchases of Air Brake common, for purchases and sales of different classes of securities cannot be matched, *Smolowe* v. *Delendo Corp., supra* (136 F. 2d at 237 n. 13).[20]

(b) Contrary to Standard's view, the application of § 16(b) may well depend on the form of the transaction. Thus a 12% stockholder may be liable for all his profits if he sells his holdings in a single deal; but he can substantially reduce his liability by selling first 3% and then 9% of his holdings, *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418 (1972).

The form of the transaction is particularly important in merger cases. Thus, in *Newmark* v. *RKO General, Inc.*, 425 F. 2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970), the defendant RKO controlled Frontier Airlines: it purchased 49% of the stock of Central Airlines and, within six months, caused Central to be merged into Frontier. RKO was held liable under § 16(b) because the merger constituted a sale of its Central stock. Suppose, however, that RKO had caused Frontier to be merged into Central. RKO would then have escaped liability because it would have retained its Central shares instead of selling them. The form of the transaction was thus crucial.

It is equally crucial here; indeed, it makes good sense to differentiate between the forms of merger. Had Standard been merged into Air Brake and had Crane simply retained its old Air Brake common shares, the merger would not

20. The convertibility of the hypothetical new Air Brake preferred would not render it the "economic equivalent" of the pre-merger Air Brake common. The old Air Brake common owned 100% of the Air Brake equity. The hypothetical new Air Brake preferred would have been convertible into new common stock of the surviving corporation constituting only 34.6% of its equity (A117-118).

have constituted a "sale" and, hence, would not have subjected Crane to 16(b) liability even if it had inside information. In this hypothetical setting it might be reasonable to impose liability if, shortly after the merger, Crane voluntarily sold its shares in the market. Not so in the actual case of a merger of Air Brake into Standard. That merger would itself have constituted an actionable "sale" but for Crane's lack of inside information. Crane's exposure to liability by virtue of the merger itself satisfies the statutory purpose of suppressing the abuse of inside information. There is, consequently, no need or reason to stretch the statute, contrary to its terms, to match Crane's pre-merger purchases of Air Brake common against its post-merger sale of Standard preferred. See the opinion below (31a-32a).

(c) Finally, the choice of the surviving corporation in a merger is by no means "happenstance", as Standard contends. With Standard two or three times the size of Air Brake and Air Brake needing Standard's help, the survival of Standard was but natural. As any corporation lawyer knows, numerous factors dictate the selection of the survivor in a merger.[21] They may include the 16(b) effects of the merger. Air Brake and Standard had planned their merger in the hope of subjecting Crane to 16(b) liability (A200-203). Making Air Brake the survivor would have impaired that hope and might, instead, have exposed Standard insiders to 16(b) liability.

The record does not reveal the reasons for the choice of Standard as the survivor, and we need not speculate.

21. Thus the tax consequences may differ. Dissenters' appraisal rights may depend on the choice. The debt instruments of one of the merging companies may prevent its absorption without the consent of its creditors. Had Air Brake instead of Standard survived, the merged entity would have been governed by Pennsylvania law rather than the more liberal Delaware law. The three Air Brake directors elected by Crane would have remained directors of the surviving Air Brake.

Enough it is that it was Standard and its predecessor who made the choice. Standard cannot now assert rights it might have if it had chosen differently.

5. Standard's claim does not warrant review by this Court. Unlike another 16(b) case in which this Court recently granted certiorari, *Provident Securities Co.* v. *Foremost-McKesson, Inc.*, 43 USLW 3446 (No. 74-742, Feb. 18, 1975), the decision below presents no conflict with other Circuits. Standard admits that its claim is unprecedented (Pet. 19). In the forty years since the enactment of § 16(b), no comparable case has arisen (25a). None may recur for a long time, if ever. Standard's novel theory, implausible and labored as it is, has received the most thorough and thoughtful consideration from the Court below. We submit that it does not merit the added attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. HAUDEK
295 Madison Avenue
New York, N. Y. 10017
(Tel. (212) 532-4800)

JOHN W. CASTLES III
25 Broadway
New York, N. Y. 10004
(Tel. (212) 344-8480)
Attorneys for Respondent.

POMERANTZ LEVY HAUDEK & BLOCK,
LORD DAY & LORD,
of counsel.

May 12, 1975.

ADDENDUM

Litigations between the parties

The following is a highly abbreviated summary of the litigations between the parties (R103 to 113):

1. On January 8, 1968 Crane brought suit in Pennsylvania for the production of Air Brake's stock list. After a jury trial the action was dismissed on February 23, 1968. *Crane Co.* v. *Westinghouse Air Brake Co.* (Court of Common Pleas of Allegheny County, Pa., No. 244 April Term, 1968).

2. On February 16, 1968 Crane brought another action for production of Air Brake's stock list, this time in the New York Supreme Court. On February 29, 1968 the action was dismissed on res judicata grounds. *Application of Crane Co.* v. *Westinghouse Air Brake Co.* (Sup. Ct., N.Y. Co., No. 2758/68).

3. On March 12, 1968, after the public announcement of the proposed Air Brake-Standard merger, Crane brought a third action for the stock list. After removal to the federal court and remand, the state court directed production of the stock list on April 3, 1968. *Application of Crane Co.* v. *Westinghouse Air Brake Co.* (Sup. Ct., N.Y. Co., No. 4188/68), 56 Misc. 2d 538, 288 N.Y.S.2d 984.

4. On April 5, 1968 Crane brought suit to enjoin Air Brake from communicating with its stockholders without first sending to them Crane proxy materials. Crane secured a temporary restraining order. An agreement of the parties disposed of the action and the order on April 9, 1968. *Crane Co.* v. *Westinghouse Air Brake Co.* (S.D.N.Y., 68 Civ. 1400).

5. On April 5, 1968 Air Brake petitioned the Court of Common Pleas of Allegheny County, Pennsylvania, in No.

1, above, for a contempt order against Crane. The petition was disposed of by agreement of the parties of April 9, 1968 (No. 4, above).

6. On April 17, 1968 Crane brought suit against Air Brake and its directors for proxy fraud and other proxy rule violations. After trial before Ryan, J., the action was dismissed by judgment of June 5, 1968, and the Second Circuit affirmed the dismissal in *Crane I. Crane Co.* v. *Westinghouse Air Brake Co. et al.* (S.D.N.Y., 68 Civ. 1560).

7. On April 25, 1968, Crane petitioned the New York Supreme Court (in No. 3, above) for the imposition of contempt penalities and other relief against Air Brake, for failure to comply with the order requiring production of Air Brake's stock list. After hearing, the stock list was duly produced.

8. On May 6, 1968 Crane brought an action for fraud against Standard and Blyth & Co. After trial before Ryan, J. (together with No. 6, above), the action was dismissed by judgment of June 5, 1968, but the Second Circuit reversed the dismissal in *Crane I* and remanded for determination of Crane's remedies. *Crane Co.* v. *American Standard, Inc. et al.* (S.D.N.Y., 68 Civ. 1845).

9. On or about May 14, 1968 Crane brought suit in the New York Supreme Court against several brokerage firms and Air Brake to enjoin the voting of certain Air Brake shares in favor of the merger. *Crane Co.* v. *Salomon Brothers & Hutzler et al.* (Sup. Ct., N.Y. Co., No. 7897/68).

10. On or about June 3, 1968, Air Brake brought suit against Crane and others in the United States District Court for the Western District of Pennsylvania, to enjoin Crane's nominees from serving as directors of Air Brake and for other relief. Crane's answer asserted a counter-

claim for an injunction and for treble damages. *Westinghouse Air Brake Co.* v. *Crane Co. et al.* (W.D. Pa., No. 68-616).

11. On June 17, 1968 Standard brought its present 16(b) action against Crane (S.D.N.Y., 68 Civ. 2461).

Unless otherwise indicated, the actions are still pending.